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First Hudson Capital, LLC v. Seaborn

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Rent stabilization is an exercise of the state's police power.¹ It is a response to market imbalances that create mass dislocations and shortages of affordable housing.² Rent stabilization protects tenants.³ It entitles tenants to lease renewals, protects against arbitrary evictions, and limits landlord imposed rent increases.⁴ The Division of Housing & Community Renewal ("DHCR") promulgates the rules for Rent Stabilization Law in New York City.⁵ The DHCR is charged with preserving and expanding affordable housing for tenants.⁶ In fact, the DHCR is barred from enacting a regulation that does not protect tenants.⁷ Properly aligned with this principle is section 2525.7 of the Rent Stabilization Code ("Proportionality Provision").

The Proportionality Provision was enacted in 2000 by the DHCR⁸ under the umbrella of section 235-f of the Real Property Law ("Roommate Law").⁹ While Roommate Law protects the sharing of rent regulated apartments, the Proportionality Provision restricts tenants from overcharging their roommates.¹⁰ Under the Proportionality Provision, tenants may not charge their roommates more than a proportionate share of the legal regulated rent.¹¹ This share is determined by dividing

1. *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 417–18 (1994).
2. *Id.*; see also Timothy L. Collins, *Legal Developments: "Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide*, 59 ALB. L. REV. 1293, 1314 (1996) (noting that "housing shortages work particular hardships on lower income households" and that the intent to prevent such hardships can be found "in the Findings and Declaration of Emergency upon which the Rent Stabilization is premised").
3. David E. Frazer, Letter to the Editor, *Loft Pioneers' New Frontiers*, N.Y. TIMES, Mar. 14, 1999, § 11, at 8.
4. *Id.*
5. N.Y. COMP. CODES R. & REGS. tit. 9, § 2520.1 (2008); *KSLM-Columbus Apartments, Inc. v. New York State Div. of Hous. and Cmty. Renewal*, 5 N.Y.3d 303, 310 (2005).
6. NEW YORK STATE DIV. OF HOUS. & CMty. RENEWAL, DHCR MISSION, VISION AND CORE VALUES (1999), <http://www.dhcr.state.ny.us/AboutUs/mission.htm>.
7. N.Y. UNCONSOL. LAW § 26-511(c)(1) (McKinney 2003).
8. 22 N.Y. Reg. 18 (Dec. 20, 2000).
9. N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2008) ("Housing accommodations subject to the RSL and this Code may be occupied in accordance with the provisions and subject to the limitations of section 235-f of the Real Property Law.").
10. *Bryant v. Carey*, 765 N.Y.S.2d 146, 147 (N.Y. Civ. Ct. 2003).
11. Tit. 9, § 2525.7(b). The Proportionality Provision, in pertinent part, reads:
The rental amount that a tenant may charge a person in occupancy pursuant to [the Roommate Law] shall not exceed such occupant's proportionate share of the legal regulated rent charged to and paid by the tenant for the subject housing accommodation. For the purposes of this subdivision, an occupant's proportionate share shall be determined by dividing the legal regulated rent by the total number of tenants named on the lease and the total number of occupants residing in the subject housing accommodation. However, the total number of tenants named on the lease shall not include a tenant's spouse, and the total number of occupants shall not include a tenant's family member or an occupant's dependent child. Regardless of the number of occupants, tenants named on the lease shall remain responsible for payment to the owner of the entire legal regulated rent. The charging of a rental amount to an occupant that exceeds that occupant's proportionate share shall be deemed to constitute a violation of this Code.

Id.

the rent by the number of tenants and roommates.¹² Charging a rental amount which exceeds the occupant's proportionate share is a violation of the Code.¹³ The provision, however, does not expressly provide any remedies to an aggrieved party.¹⁴ Recently, the First Department, in *First Hudson Capital, LLC v. Seaborn*, held that the provision vests a roommate with the right to file a complaint against the tenant and does not create a cause of action for eviction by the landlord.¹⁵

Despite the Proportionality Provision's exclusion of remedial terms, courts have read a remedy into the provision, especially in cases in which a tenant had engaged in abusive practices of rent overcharge (e.g., in cases of profiteering and commercial exploitation). The first instance occurred in *Ram I LLC v. Mazzola*, where the Appellate Term, First Department, allowed a landlord to evict a tenant who had charged her roommate more than the "proportionate share" of the rent.¹⁶ Most courts which have read an eviction remedy for the landlord into the Proportionality Provision have done so only in limited circumstances: either when a tenant has substantially overcharged a roommate, evidencing bad faith or an intent to profiteer,¹⁷ or when the overcharge reaches a level of commercial exploitation.¹⁸ Before *First Hudson Capital* was decided, some lower courts interpreted the provision in this way.¹⁹ Still, other courts at that time disapproved of reading an eviction remedy into the Proportionality Provision.²⁰ *First Hudson Capital* has rejected the former interpretation all together, holding that "to the extent those cases presuppose a cause of action for eviction by the landlord, they should not be followed."²¹

12. *Id.*

13. *Id.*

14. *See id.*

15. *See First Hudson Capital, LLC v. Seaborn*, 862 N.Y.S.2d 501 (1st Dep't 2008).

16. No. 01-294, 2001 N.Y. Misc. LEXIS 747, at *1 (N.Y. App. Term Dec. 28, 2001).

17. *See 54 Greene Street Realty Corp. v. Shook*, 779 N.Y.S.2d 77 (1st Dep't 2004) (finding that although the tenant violated the Proportionality Provision by charging his roommate more than half the legal rent, eviction is improper because the overcharge was small and there was no evidence of bad faith or intent to profiteer); *Roxborough Apartments Corp. v. Becker*, 816 N.Y.S.2d 810, 811-12 (N.Y. App. Term 2006) (finding that although the tenant charged his roommates a disproportionate amount of rent, eviction is improper because there was no evidence of bad faith and the overcharge did not rise to a level of profiteering).

18. *West 148 LLC v. Yonke*, 812 N.Y.S.2d 735 (N.Y. App. Term 2006) (finding that the tenant's behavior rose to the level of commercial exploitation and that eviction was proper when the tenant charged her roommates nearly double the legal rent, printed business cards that referred to her apartment as a "Bed and Breakfast," and listed her apartment under "Affordable Hotels" on the Internet).

19. *See 156-158 Second Avenue, LLC v. Delfino*, 859 N.Y.S.2d 896 (N.Y. Civ. Ct. 2008).

20. *See SBR Associates LLC v. Diederich*, No. 2002-1649, 2003 WL 21511320, at *1 (N.Y. App. Term May 29, 2003) (finding that the tenant did not violate the Proportionality Provision, and stating, albeit in dicta, that the DHCR enacted the provision to allow aggrieved roommates to file a claim against a named tenant, not to create a new cause of action for eviction).

21. *First Hudson Capital*, 862 N.Y.S.2d at 503.

In *First Hudson Capital*, the Appellate Division, First Department, reversed the appellate term's decision and denied an eviction remedy to the plaintiff landlord against his rent-stabilized tenant.²² The rent-stabilized tenant, defendant Ron Seaborn, overcharged some of his roommates a disproportionate amount of rent.²³ Although this overcharging violated the Proportionality Provision, the court did not grant plaintiff's request that Seaborn be evicted.²⁴ The dissent adamantly disagreed with the majority opinion and insisted that the tenant's actions justified eviction.²⁵

Defendant Seaborn moved into the apartment in 1976.²⁶ He invested thousands of dollars in the space, made major improvements, and qualified for rent-stabilized status.²⁷ Plaintiff First Hudson Capital, LLC took over the building in June 2004.²⁸ During his occupancy, Seaborn shared the apartment with various roommates.²⁹ Seaborn requested that some of these roommates pay more than their proportionate share of the rent and, in two instances, requested his roommates pay more than the rent actually owed to the landlord.³⁰

Plaintiff landlord learned of the over-charging and filed an eviction claim.³¹ Plaintiff argued that Seaborn was engaged in profiteering in connection with the rent-stabilized apartment.³² In support of his argument, the landlord offered into evidence Seaborn's *Village Voice* advertisements, in which he sought roommates and the subsequent rent overcharge of those roommates.³³ Following a non-jury trial, the civil court found that the landlord's evidence was "overwhelming" and awarded him possession of the apartment.³⁴ Seaborn attempted to cure the violation by refunding the excess rent his former roommates had paid and moved to set aside the eviction warrant.³⁵ The civil court denied the motion because it found the facts of the case did not lend themselves to a cure.³⁶

22. *Id.* at 501.

23. *Id.* at 503.

24. *Id.*

25. *See id.* at 503–04 (Saxe, J., dissenting).

26. *First Hudson Capital, LLC v. Seaborn*, 833 N.Y.S.2d 834, 835 (N.Y. App. Term 2007) (McCooe, J., dissenting).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (majority opinion).

31. *See id.*

32. *See id.* at 834.

33. *See id.* at 835.

34. *Id.* at 834.

35. *Id.* at 835 (McCooe, J., dissenting).

36. *Id.* at 836.

Seaborn appealed, but the Appellate Term found that the civil court had reasonably assessed the evidence and therefore upheld the eviction warrant.³⁷ In dissent, Judge McCooe argued that, although overcharging a roommate violates the Proportionality Provision, eviction is not an appropriate remedy for such a violation.³⁸ The dissent noted that when the DHCR promulgated the Proportionality Provision, it intended to vest a roommate with the right to file a complaint against the tenant but not to create a separate cause of action for eviction.³⁹ He also argued that if the DHCR intended to include an eviction remedy it would have expressly done so, just as it had done for other, similar provisions.⁴⁰ Even if an overcharge could be a basis for eviction in cases of profiteering or commercial exploitation, Judge McCooe opined that Seaborn's actions constituted neither.⁴¹

On further appeal, the First Department reversed the appellate term's decision and granted Seaborn's motion to vacate the warrant of eviction.⁴² The court looked to the plain meaning of the Proportionality Provision and found that the provision simply does not provide for termination of the lease.⁴³ Although decided a decade before the provision was enacted, the majority relied on *520 E. 81st St. Assocs. v. Roughton-Hester*, which had found that no law governing rent stabilized apartments allows a landlord to evict a tenant for earning a profit.⁴⁴ The legislative mandate was made clear, the court noted, when the statute was later amended and the legislature still omitted an eviction remedy—even with *Roughton-Hester* on the law makers' minds.⁴⁵

Two of the five presiding First Department judges dissented and forcefully rejected the idea that the Proportionality Provision was intended to be “an empty prohibition with no means of enforcement.”⁴⁶ Writing for the dissent, Judge Saxe noted that the court had not found an error in past cases that either directly or impliedly read an eviction remedy into the Proportionality Provision.⁴⁷ The dissent also criticized the majority's reasoning on two fronts. First, the majority did not directly rule on the issue of whether the provision supports a judgment of eviction for a tenant that profiteers.⁴⁸ Second, the majority opinion contains a fundamental in-

37. *Id.* at 834 (majority opinion).

38. *Id.* at 836 (McCooe, J., dissenting).

39. *Id.*

40. *Id.*

41. *Id.* at 836–37.

42. *First Hudson Capital*, 862 N.Y.S.2d at 501.

43. *Id.* at 502.

44. *Id.*

45. *Id.*

46. *Id.* at 504 (Saxe, J., dissenting).

47. *See id.*

48. *Id.*

consistency: the court distinguishes Seaborn's actions with that of egregious commercial exploitation, which has justified eviction in previous cases, and yet seems to reject the idea of an eviction remedy in any situation.⁴⁹

The *First Hudson Capital* decision is a departure from a number of past cases, and for that reason the First Department took a bold stand. Ultimately, the court's decision may prove unpopular among some circles.⁵⁰ It is hard to deny that, at first glance, there is an inclination that it is fundamentally unfair to refuse the landlord a right to evict. After all, a tenant that overcharges his roommate is profiting off property owned by the landlord—should the tenant enjoy the fruit of the landlord's labor? In addition, unlike other arrangements such as subletting, there is little landlord oversight in the tenant/roommate arrangement.⁵¹ Thus, the possibility of roommate overcharge would be lessened if tenants believed such an arrangement would result in the serious penalty of eviction.⁵² Regardless, lower courts are bound by the *First Hudson Capital* decision. Failing to follow the *First Hudson Capital* decision would not only violate stare decisis, but would violate settled principles of statutory construction.

To presume an eviction remedy for violations of the Proportionality Provision would ignore the well-settled principle of interpreting an existing statute in accordance with legislative intent, and not to willfully amend that statute judicially.⁵³ The absence of a remedial provision in the Proportionality Provision most likely reflects the legislature's intent to exclude it altogether.⁵⁴ The regulation's text is the law, the interpretive starting point.⁵⁵ When the regulation is unambiguous, it is the interpretive endpoint as well.⁵⁶ As *First Hudson Capital* rightly points out, the language of the Proportionality Provision does not provide for termination of the lease. In short,

49. *Id.*

50. *See id.*

51. *Id.* at 505 (“When the tenant sublets, the landlord is entitled to demand an array of information, including a copy of the sublease, whereas the landlord has no right to any such information with respect to a roommate beyond the name of the new occupant.” (quoting N.Y. REAL PROP. LAW § 235-f(5) (McKinney 2008))).

52. *Id.* at 505–06.

53. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 518 (1926) (“[I]t is very clear that amendment may not be substituted for construction, and that a court may not exercise legislative functions”); N.Y. STAT. LAW § 74 (McKinney 2008).

54. § 74 (“A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended.”); *see also* *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (“[T]here are no exemptions in the Endangered Species Act for federal agencies, meaning that under the maxim *expressio unius est exclusio alterius*, we must presume that these were the only ‘hardship cases’ Congress intended to exempt.”).

55. *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) (“As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”).

56. *Id.* (quoting *Tompkins v. Hunter*, 149 N.Y. 117, 122–23 (1896)).

reading a remedy into the provision would represent a radical act of judicial activism and violate the most fundamental principle of statutory construction.

In addition, the DHCR, as an administrative agency, has limited regulatory authority. It cannot make broad based policy decisions; rather, it may only enact regulations that are harmonious with the overall purpose of its enabling statute.⁵⁷ The Proportionality Provision's enabling statute is the Roommate Law.⁵⁸ In *Capital Holding Company v. Stavrolakes*, a landlord sought to terminate the lease with his tenant for an alleged violation of the Roommate Law.⁵⁹ The court ruled against the landlord, concluding that the Roommate Law was passed to protect tenants and roommates, not landlords.⁶⁰ The court held that the Roommate Law does not permit an eviction remedy and provides remedies only for statutory violations committed by landlords.⁶¹ Thus, the Roommate Law was not enacted to provide landlords a cause of action to evict their tenants and those tenants' roommates.⁶² Because the Proportionality Provision must be in harmony with the Roommate Law, an eviction remedy may not be read into the provision either.

Similarly, the DHCR's purpose in promulgating the Proportionality Provision was to protect tenants and roommates, not landlords.⁶³ In fact, this had to be its purpose since the Roommate Law, which was passed to protect tenants and roommates,⁶⁴ enabled the DHCR to pass the provision in the first place.⁶⁵ It then follows that the DHCR could not have passed the provision unless it was meant to protect tenants and roommates as well. Another of the DHCR's purposes in enacting the Proportionality Provision was to conform its regulations to existing statutes, case law, and agency practices.⁶⁶ Before the Proportionality Provision was enacted, landlords could not evict tenants for overcharging roommates.⁶⁷ Tenants,

57. See, e.g., *Gen. Elec. Capital Corp. v. N.Y. State Div. of Tax Appeals*, 2 N.Y.3d 249, 254 (2004).

58. N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2008).

59. *Capital Holding Co. v. Stavrolakes*, 662 N.Y.S.2d 14 (1st Dep't 1997).

60. *Id.* at 15–16.

61. *Id.* at 16.

62. *Id.*

63. See Kenneth Lovett, *Tenants in a Tizzy over State's New Rent Rules*, N.Y. Post, Dec. 22, 2000, at 8. Joseph Lynch, the State Division of Housing & Community Renewal Commissioner, stated that the code conforms to the law as it stood before its enactment “to ensure tenants get the protection they deserve.” *Id.* He also expressed that it would “provide strong protection” to tenants. *Id.* Marcia Hirsh, General Counsel for the DHCR at the time of enactment, stated that the Proportionality Provision was never meant to provide an eviction remedy but was enacted to give roommates the right to file a complaint against the tenant. Laurel R. Dick, *Regulating Roommate Relations: Protection or Attack Against New York City's Tenants?*, 10 J.L. & POL'Y 539, 547 n.36 (2002).

64. *Stavrolakes*, 662 N.Y.S.2d at 15–16.

65. N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2008).

66. 22 N.Y. Reg. 18 (Dec. 20, 2000).

67. 520 E. 81st St. Assocs. v. Roughton-Hester, 555 N.Y.S.2d 70, 73 (1st Dep't 1990).

on the other hand, were able to file rent overcharge claims with the DHCR.⁶⁸ The process through which tenants did this, however, was problematic because of the backlog of cases and the length of the review process, which could take years.⁶⁹ As a result, tenants and roommates often decided not to file claims.⁷⁰ Given this burdensome process, the DHCR promulgated the Proportionality Provision to give tenants a more efficient means of filing a complaint, not for the purpose of providing landlords an eviction remedy.

Although lower courts are bound by the court's holding in *First Hudson Capital* and thus from finding an eviction remedy in the Proportionality Provision, the Court of Appeals is not so limited. The *First Hudson Capital* decision, which is listed as a recently-filed appeal,⁷¹ should be upheld. If not persuaded by the arguments presented thus far, the Proportionality Provision when read in congruence with other provisions of the Rent Stabilization Code provides a strong basis to keep the rule as it stands today—the way the *First Hudson Capital* court has held.

Where the legislature intended an eviction remedy to be available, it provided the remedy in other provisions.⁷² The structure of the entire regulatory scheme is evidence of the DHCR's intent: "It is a well-settled principle of statutory construction that a statute or ordinance must be construed as a whole and that its various sections must be considered together and with reference to each other."⁷³ The Rent Stabilization Code contains twelve interlocking parts.⁷⁴ One of the parts houses section 2524.3 ("Evictions Provision").⁷⁵ The Evictions Provision lists all the circumstances in which the landlord may seek an eviction remedy for his tenants' wrongful acts.⁷⁶ More telling than its absence within the Proportionality Provision is the absence of an eviction remedy for overcharging a roommate within the Evictions Provision.⁷⁷ Additionally, a separate section, section 2525.6 ("Sublet Provision"), unlike the Proportionality Provision, does provide for termination of the lease when

68. See generally Kenneth B. Hawco, *Complaining About a Rent Overcharge in New York City*, <http://www.tenant.net/alerts/articles/complaining.html> (last visited Nov. 5, 2008).

69. See generally *id.*

70. See generally *id.* (explaining that it can take years for the DHCR to decide a rent overcharge complaint, and, even if the tenant wins, the landlord can appeal with the DHCR free of charge).

71. Court of Appeals New Filings at Vol. 28, No. 36, *First Hudson Capital, LLC v. Seaborn*, No. 570040/06 (Sept. 12, 2008).

72. *Sullivan v. Brevard Associates*, 66 N.Y.2d 489, 493–94 (1985).

73. *N.Y. v. Mobil Oil Corp.*, 48 N.Y.2d 192, 199 (1979).

74. See N.Y. COMP. CODES R. & REGS. tit. 9, pt. 2520–2531 (2008).

75. *Id.* § 2524.3.

76. *Id.* According to the Evictions Provision, an eviction remedy is available to the landlord where the tenant is violating a substantial obligation of his or her tenancy, committing or permitting a nuisance in the apartment, occupying the apartment illegally, using or permitting the apartment to be used for illegal or immoral purposes, unreasonably refusing access to the landlord, refusing to renew an expiring lease upon notice, or violating the Sublet Provision. *Id.*

77. See *id.*

a tenant overcharges other subtenants.⁷⁸ Specifically, the Sublet Provision states that overcharging a subtenant is grounds for termination of the tenancy by the owner.⁷⁹ And, not surprisingly, this right of eviction is also expressed within the Evictions Provision.⁸⁰

When a tenant transfers his entire interest in a property to a third party and retains a reversionary interest, the transfer constitutes a sublease.⁸¹ The subtenant occupies the property according to an agreement with the tenant and with written consent of the owner.⁸² As such, the owner is a party to the sublease. The tenant and subtenant are usually strangers,⁸³ and as a consequence there is more of a risk that the subtenant will be overcharged. Therefore, additional oversight by the landlord serves to protect the subtenant. Similar to the Proportionality Provision, the Sublet Provision was enacted to protect subtenants.⁸⁴ However, unlike the Proportionality Provision, the Sublet Provision provides an eviction remedy, but not without first making the damaged subtenant whole. A tenant who overcharges his subtenant is liable for treble damages to the damaged subtenant.⁸⁵ Additionally, before a landlord can evict the tenant, the subtenant's lease must expire.⁸⁶ The Proportionality Provision lacks an analogous safeguard for roommates.

The Roommate Law makes it unlawful for a landlord to restrict a tenant from having roommates.⁸⁷ It defines a roommate as someone other than a tenant occupying the property with the consent of the tenant.⁸⁸ Unlike the tenant/subtenant relationship, many tenant/roommates are not strangers but individuals who choose to live together, apportioning the costs according to their respective financial abilities, among other considerations.⁸⁹

Given the differences between roommates and subtenants, the absence of an eviction remedy within the Proportionality Provision makes sense. First, the roommate arrangement may stem from a personal relationship in which the roommate, knowing the total cost of rent, has willingly agreed to pay more than his propor-

78. *Id.* § 2525.6.

79. *Id.*

80. *Id.* § 2524.3(h) ("In the event of a sublet, an owner may terminate the tenancy of the tenant if the tenant is found to have violated the provisions of section 2525.6 of this Title.").

81. *See* *New Amsterdam Casualty Co. v. Nat'l Union Fire Ins. Co.*, 266 N.Y. 254 (1935).

82. N.Y. REAL PROP. LAW § 226-b (McKinney 2008); *see also* *Roughton-Hester*, 555 N.Y.S.2d at 72.

83. *Roughton-Hester*, 555 N.Y.S.2d at 73 (stating that roommates are often not strangers but people who choose to live together that mutually decide on how to apportion all costs).

84. *See id.*

85. Tit. 9, § 2525.6(b).

86. *See id.* § 2525.6(f) (stating that a landlord can terminate tenancy of a tenant before expiration of the lease, if the rental unit is the tenant's primary residence).

87. N.Y. REAL PROP. LAW § 235-f (McKinney 2008).

88. *See id.*

89. *Roughton-Hester*, 555 N.Y.S.2d at 73.

tionate share of that rent.⁹⁰ In the context of unmarried couples, particularly gay and lesbian couples, it is only natural to apportion rent according to who can afford it.⁹¹ In contrast, the parties to a subletting arrangement are usually strangers.⁹² Second, tenants frequently offer something in exchange for charging a higher portion of the rent, such as furnishings, utilities, and chores.⁹³ In the subletting context, the Sublet Provision provides for such a circumstance—it allows the tenant to charge an extra 10% if the sublet is fully furnished.⁹⁴ In both situations, where the tenant/roommate have a personal relationship and where the tenant offers something of value, the tenant and roommate benefit from the arrangement. Third, the landlord is not a party to the roommate transaction. He need only be informed of the presence of a roommate but must give written consent for a tenant to sublease.⁹⁵ As a third-party, the landlord has no legal right to assert that an agreement between a satisfied tenant and roommate has been broken.⁹⁶ Fourth, it is unlikely that a roommate would benefit from landlord oversight. Since the tenant and roommate usually have a relationship with each other prior to the living arrangement⁹⁷ and, at the very least, are living with one another, tenant and roommate will have frequent contact with each other. Thus, the roommate would be aware of any rent overcharge.

The Proportionality Provision is meant to give a roommate the opportunity to bring an action if he or she chooses to do so.⁹⁸ Rather than enable a landlord to evict a tenant and roommate, the Proportionality Provision lets the roommate decide the fairness of the living arrangement and whether to bring a cause of action. In *Bryant v. Carey*, the roommate brought an action against the tenant for rent overcharges.⁹⁹ The court held that a roommate, “the party actually aggrieved,” can sue the tenant

90. Dick, *supra* note 63, at 553.

91. *Id.* at 553–54.

92. See *Roughton-Hester*, 555 N.Y.S.2d at 73.

93. Dick, *supra* note 63, at 570. There are various services which the tenant may offer to a roommate in exchange for a lower portion of the rent “such as furnishings, utilities, food, chores, childcare, freedom from paying a security deposit, and freedom from committing to a long term lease.” *Id.* “In fact, the Proportionality Provision does not even allow for a greater share of the rent to be paid by a roommate who occupies a greater number of the rooms.” *Id.* at 571.

94. N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.6(b) (2008).

95. Compare N.Y. REAL PROP. LAW § 235-f (McKinney 2008) (stating that the tenant must “inform the landlord of the name of any occupant within thirty days following the commencement of occupancy”), with N.Y. REAL PROP. LAW § 226-b (McKinney 2008) (stating that the tenant “shall have the right to sublease his premises subject to the written consent of the landlord in advance of the subletting”).

96. *Williams v. Eggleston*, 170 U.S. 304, 309 (1898) (“The parties to a contract are the ones to complain of a breach, and if they are satisfied with the disposition which has been made of it and of all claims under it, a third party has no right to insist that it has been broken.”).

97. See *Roughton-Hester*, 555 N.Y.S.2d at 73.

98. See *Bryant*, 765 N.Y.S.2d at 149.

99. *Id.* at 147.

for damages.¹⁰⁰ The court ordered the tenant to provide the difference to the aggrieved roommate.¹⁰¹ Providing the roommate discretion to initiate a claim is logical. If both the tenant and roommate are pleased with their living arrangement, all is well. If not, the roommate should be the one to initiate a claim, not the landlord. This interpretation of the Proportionality Provision is both practical and consistent with the provision's text, scope, purpose, and case law.

In conclusion, lower courts are now bound by *First Hudson Capital* and the New York Court of Appeals should uphold that decision. To read an eviction remedy into the Proportionality Provision would violate the principles of statutory construction and represent a massive indiscretion on the court's part. The provision's text does not provide an eviction remedy,¹⁰² and its exclusion was likely intended.¹⁰³ Even if the DHCR intended to include such a remedy in the Proportionality Provision, the Roommate Law (the Proportionality Provision's enabling statute) does not allow it.¹⁰⁴ Further, the DHCR's purpose is to protect roommates, allowing landlords to oust both tenant and roommate for what largely amounts to a personal arrangement between the parties undermines this purpose.¹⁰⁵ Finally, the Rent Stabilization Code structurally prohibits such an interpretation.¹⁰⁶

From an equitable perspective, to read an eviction remedy into the provision would prejudice tenants. It would give landlords the ability to play gatekeeper with the lives of tenants and roommates.¹⁰⁷ A landlord would be able to evict a tenant and roommate even when both are satisfied with their living arrangement.¹⁰⁸ This would create an incentive for landlords to pry into these arrangements.¹⁰⁹ Additionally, legislation that gives roommates a right to care for one another, like outpatient commitment, would be stifled.¹¹⁰ Such legislation is premised on the idea that roommates

100. *Id.* at 149.

101. *Id.* at 150.

102. N.Y. COMP. CODES R. & REGS. tit. 9, § 2525.7 (2008).

103. *See supra* pp. 326–27.

104. *Stavrolakes*, 662 N.Y.S.2d at 15–16; *see also supra* p. 327.

105. *See Lovett, supra* note 63, at 8; *supra* pp. 327–28.

106. *See supra* pp. 328–29. *See generally* tit. 9, pt. 2520–2531.

107. Bruce Lambert, *Rule Limits Overcharging of Roommates*, N.Y. TIMES, June 5, 2001, at B1 (noting that it creates a potential for mass evictions).

108. Dick, *supra* note 63, at 553 (“[L]andlords may have great latitude in choosing who to evict under the proportionality provision, and can do so based on what they stand to gain from the eviction.”).

109. *Id.* at 554–55. Landlords are not privy to a roommate's rent amount, they must use creative means to get that information, and such means may border on harassment. *Id.* at 555. Measures such as sending every tenant a threatening letter demanding to know if they had a roommate and how much they were charging have been exhibited by landlords. Lambert, *supra* note 107.

110. *See generally* N.Y. MENTAL HYG. LAW § 9.60(e) (McKinney 2005). Originally only hospital directors were able to petition the court for outpatient commitment, but mental hygiene law broadens this authority to include roommates. Jennifer Gutterman, Note, *Waging a War on Drugs: Administering a Lethal Dose to Kendra's Law*, 68 FORDHAM L. REV. 2401, 2412 (2000).

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are much more than strangers sharing a living space. The negative effects of such a decision would be one-sided and would harm tenants, the very people the DHCR is supposed to, and has sworn to, protect.¹¹¹

111. N.Y. UNCONSOL. LAW § 26-511(c)(1) (McKinney 2003).